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# No. 80-2186

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

JOHN E. BOYD,

*Petitioner,*

v.

WESTERN ELECTRIC, a corporation, JOHN D. DEBUTTS and THEODORE G. CLARK,

*Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

## REPLY BRIEF FOR PETITIONER

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September, 1981

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WESTERN ELECTRIC, a corporation, JOHN D. DEBUTTS and THEODORE G. CLARK,
Defendants.

# REPLY BRIEF FOR PETITIONER

First, the most important aspect of respondents' brief is what it left unsaid because respondent omits all reference to the following:

1. The tortious interference by Western Electric ( Hereinafter, "Western" ) with the offer of a position by the American Telephone and Telegraph Co.( Hereinafter, "A. T. & T. Co." ) in November, 1973.

2. The fact that the co-engineer of petitioner at Kearny Works of Western, who

was dismissed by Western in November, 1971 and who sued Western for tortious interference with her employment contract and other counts, in the same district court as petitioner, was reinstated in a judgment by Judge Stern, with back and increased pay and damages, for her state claims (as distinct from her sex bias demands). Judge Stern ruled that she had suffered, "(t)ortious interference with her employment contract with Western" Kyriazi v. Western Electric Co., 461 F. 894 (D.N.J. 1978) at 950 ( PA52 )[1]

3. Respondents continue to misread the facts to suggest that petitioner was dismissed, whereas actually he retired under a pension contract (Special Early Retirement Contract: hereinafter "SERP" contract), signed under duress.

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1. "PA" refers to petitioner's appendix; "PB" to petitioner's brief; "RA" to respondents' appendix and "RB" to respondents' brief.

4. Respondents fail to mention that if the petitioner had been dismissed, in fact, he would be in the same category as fellow-engineer, Kyriazi, who was reinstated by Judge Stern, as noted above.

## OPINIONS BELOW

Petitioner respectfully submits that the Opinions below are adequately identified in the petition (PA1-51).

## JURISDICTION

Petitioner respectfully submits that facts relating to this Court's jurisdiction are adequately set forth in the petition; and petitioner submits that the petition was filed in timely fashion; because the petition was filed on March 4, 1981, which is 56 days from the date of filing of the judgment being appealed from in the court of appeals on Jan. 7, 1981.

## CONSTITUTIONAL PROVISIONS

Petitioner respectfully submits that

constitutional provisions are adequately set forth in the petition (PB3).

## STATUTES AND RULES

Petitioner submits that statutes and rules are set forth in petition and respondents' brief except for United States Supreme Court Rule 33.7 which is as follows:

> "The Clerk shall not accept for filing any document presented in a form not in compliance with this Rule, but shall return it indicating to the defaulting party wherein he has failed to comply: the filing, however, shall not thereby be deemed untimely provided that new and proper copies are promptly substituted. If the Court shall find that the provisions of this Rule have not been adhered to, it may impose, in its discretion, appropriate sanctions including but not limited to dismissal of the action, imposition of costs, or disciplinary sanction upon counsel. See also Rule 38 respecting oral argument."

## STATEMENT OF THE CASE

Petitioner submits that the Statement of the Case is set forth correctly in petition. However respondents omit important facts in their Statement of the Case (RB4-8) as follows: (1) They fail to relate that Western's supervisors applied duress to petitioner previously to signing the SERP

early retirement contract on Aug. 10, 1973. (2) Respondents neglect to record the important fact that petitioner was offered a position as mentioned on page 1, by A.T.&T. Co. in N.YC. on a transfer basis but Western refused to allow petitioner to accept.

In addition, respondents improperly contain much argument in their Statement of the Case. For example, respondents err where they say, "The district judge found there was no question but that petitioner was, in effect, discharged from his employment with Western." (RB6, para. 2). What Judge Lacey did say was, "(i)t is the law of New Jersey...that the issue is whether the defendants had the right to terminate him at any time or for any reason." (PA37, 38). Obviously the court's statement is erroneous because there is no law as to issues. The above will be discussed in more detail under "Argument".

The fact or gravamen is that petitioner

was not discharged but retired on pension and respondents have created this phantom issue because they can not answer the real issues.

In respondents' brief they include several critical arguments under their "Statement of the Case". The petitioner will properly address the aforementioned arguments under the "Argument" heading of this reply brief.

Petitioner now submits this reply brief in answer to respondents' "Brief in opposition to the petition for certiorari".

## COUNTER-ARGUMENT: PART I

## REBUTTAL OF RESPONDENTS' ARGUMENTS SET FORTH UNDER RESPONDENTS' "STATEMENT OF THE CASE"

There are several issues vital to petitioner's case, which respondents incorrectly argued under their "Statement of the Case".

For example, respondents attempt to

explain away petitioner's allegation of "duress" relating to the signing of the SERP Early Retirement Contract. Respondents quote Judge Lacey as follows: "(T)he 'duress' evaporates when it is understood that because his employment was at will his employer had the right to terminate him at any time." (RB6). Here, the district court erred because "duress" is a state of mind, and when an employer threatens an employee of 26 year's service at short notice with intimations of dismissal, there is duress applied.

Respondents present other errors in their "Statement of the Facts". For example respondents quote the district court as follows: "The district judge also found that petitioner had failed to present facts in rebuttal to respondents' summary judgment motion so as to raise 'a genuine issue of material fact.'" (RB6). But petit-

ioner contends that Judge Lacey's Memorandum (PA39) contained errors and he refused to engage in fact-finding. For example, he says, "(d)uring the plaintiff's tenure with Western Electric he was not a member of a collective bargaining unit...." (PA-38). This statement is incorrect. Judge Lacey himself had dismissed Count 4 of petitioner's complaint in docket 76-2470 (79-1754 on appeal), which alleged discrimination fcr petitioner's "(m)embership or previous membership in Professional Engineers' Union CWEPE or more recently UFE...."

Another example of an issue on which there is a question of fact, is where petitioner told Judge Lacey he had an implied contract of employment with Western and Judge Lacey ruled no contract existed (Transcript dated May 24, 1978, p.39). In contrast Judge Stern ruled that Kyriazi, a co-worker under a similar set of facts as petitioner, had a contract of employ-

ment. Kyriazi v. Western Electric Co., 461 F. Supp. at 950 (D.N.J. 1978).

Other examples of questions of fact were discussed adequately in the petition.

## COUNTER-ARGUMENT: PART 2

### I. REBUTTAL OF RESPONDENTS' ARGUMENT I

### THE PETITION WAS FILED WITHIN THE 90 DAYS REQUIRED BY 28 U.S.C. §2101(c)

The respondent errs in claiming petitioner did not file his petition on time because as explained on p.3, petitioner filed on Mar. 4, 1981 which was 56 days from the Jan. 7, 1981 date of judgment of the court of appeals and this fulfills 28 U.S.C. §2101(c) which allows 90 days.

The Clerk of the Court stamped the date and told petitioner to make changes to the form to conform to June 30, 1980 Changes in United States Supreme Court Rules; e.g. the Questions had to be moved to the front and other rather extensive changes in form were required since the petition was a consolidation of several cases from below. Petit-

ioner engaged attorneys, one of whose names appears on the petition. Mr. Edward C. Schade, assistant clerk telephoned petitioner to accelerate re-submission and petitioner completed the required changes.

On June 14, 1981 petitioner telephoned Mr. Schade advising him that the petition was completed and being printed. Mr. Schade urged immediate filing. Petitioner filed 40 copies on June 25, 1981, mailing three copies to respondents from Newark, N.J. with a covering letter at 1 p.m. on June 25, 1981 at Pennsylvania Station.

Respondents showed inexcusable neglect by failing to realize they had received a petition and sleeping on the case. Petitioner telephoned respondents' attorney on July 20, 1981 and found Mr. Lynch, respondents' attorney, was on vacation and they did not realize they had a petition. Im-

mediately another attorney, Mr. S. Fortunato asked for and received from the clerk of the Supreme Court of the United States, an extension of time to Aug. 14, 1981, to file their "brief in opposition to the petition". Respondents filed brief Aug.14/81.

Respondents' citation in Schacht v. United States, 398 U.S. 58, 68-69 (1970) quotes Justice Harlan as follows: "'(i)t is always within the discretion of a court or an administrative agency to relax or modify its procedural rules for the orderly transaction of business...when in a given case the ends of justice require it." This quotation from Justice Harlan is applicable to petitioner who was allowed to refile petition under Rule 33.7 (Reply brief, p.4).

It is clear the respondents' arguments are not even reasonable and the Court was merely applying the usual rules in allowing petitioner to make corrections in form and refile; whereas in contrast respondents'

application for extension was supported by false information regarding date of receipt of copies of the petition from petitioner.

REBUTTAL OF RESPONDENTS' ARGUMENT II

THE TRIAL COURT AND THE COURT OF APPEALS DEPARTED FROM "WELL ESTABLISHED PRINCIPLES" IN GRANTING SUMMARY JUDGMENT

The district court departed from the proper application of Rule 56(b) of Fed. R. Civ. P. (RB3) and erred in applying a legal precept because: (1) it did not view inferences "(i)n the light most favorable to the party opposing the motion. The nonmovant's allegations must be taken as true and, when these assertions conflict with those of the movant, the former must receive the benefit of the doubt." Goodman v. Mead Johnson & Co., 534 F.2d 566 at 573 (3d Cir. 1976). (2) The district court did not consider the vital issues, because of the court's annoyance at petitioner's difficulty in getting competent counsel. (3), The district court

focussed on the wrong issue, supplied by the respondents, i.e. the court considered only the phantom issue of "termination" meaning "dismissal" whereas the petitioner was not terminated but retired on a pension under a pension contract.

The petitioner is challenging the issue, "the legality of a retirement contract signed under duress". The difficulties which would have been faced by respondent Western, if it had in fact, "terminated" or "dismissed" petitioner with 26 year's service, were formidable and were in fact, illustrated in the case of fellow-employee, Kyriazi (PA52).

Another important issue not considered by the district court, was the "interference with petitioner's position of advantage with respect to the offer of a job by the A. T. & T. Co., which Western refused to allow petitioner to accept." (PB35-37). Thus, the district court not only did not

consider the issue favorably to the non-movant but failed or refused to consider this issue which is vital to this suit.

Petitioner stresses that Judge Lacey's ruling refusing to reinstate petitioner is at variance with Judge Stern's ruling in the same court, reinstating Kyriazi who had shorter employment than petitioner.

Moreover, respondents' statement that, petitioner had failed to show facts limiting Western's right to terminate petitioner (RB 12, para. 1) is incorrect. Petitioner showed he was similar to Kyriazi who was ruled to have a contract of employment and to have suffered tortious interference (PB32-35; PA52).

In note 11 (RB11), respondents err in interpreting the notation on the SERP contract (PA52) which said, "(t)his form has been signed under deliberate pressure from Mr. Newill and Mr. Cuthbertson to sign or be terminated" as proving petitioner was

dismissed. The facts are that at the signing of the SERP contract on Aug.9 and 10, 1973, the respondents suggested possible dismissal in order to force petitioner to sign. If petitioner had not signed and if he had been subsequently terminated or dismissed, he would have been in the same position as Kyriazi who was reinstated by Judge Stern.

On p. 12 (RB12) respondent errs in para. 2 by stating petitioner has failed to establish the critical prerequisites to a claim of tortious interference. In the first place respondents ignore the offer of a position by A. T. & T. Co. in Nov., 1973, which Western refused to permit petitioner to accept. Here, Western is a third party who maliciously interfered with petitioner's position of advantage with respect to the A. T. & T. Co. position.

Similarly, respondents in note 13 (RB 13) again incorrectly attempt to disparage Judge Stern's use of the phrase,

"tortious interference with her employment contract" (PA52) as a slip of the pen. Respondents simply have misread and misunderstood Judge Stern. Moreover, Judge Stern ruled Kyriazi was under the six year statute of limitations for contracts (See Kyriazi v. Western Electric Co., 461 F. Supp. at 902 (D.N.J. 1978).

Moreover in the same note 13 (RB13) respondents contradict themselves by alleging a contract is necessary for the petitioner but when Judge Stern rules that Kyriazi has a contract; then, respondents say a contract is not necessary (Note 13, last sentence).

Petitioner errs in arguing public interest was not in the complaint (RB13).

The issue pleaded by respondents is that petitioner can not make a contract with his employer or sue to set aside a contract( The SERP contract), because he is an employee. This contention violates the

common law of contracts and petitioner's constitutional rights to form a contract (PB16-23).

In conclusion, the trial court improperly granted summary judgment.

## REBUTTAL OF RESPONDENTS' ARGUMENT III

## THE PETITIONER HAD A STATUTORY RIGHT TO AMEND

The distinguishing feature of this issue, is what respondents failed to mention, namely: their failure to file an answer to the complaint in docket 76-2470 (79-1754 on appeal) due to an oversight. Judge Lacey asked respondents at the March 28, 1978 hearing if they had filed an answer and respondents mistakenly told the court that they had (Transcript p. 25). Since there was no answer, petitioner had a right to amend without permission or by motion (Fed. R. Civ. P. 15(a); PB5).

The district court subsequently instructed petitioner to include more recent

specific examples of fraud. Petitioner complied with Judge Lacey's order; but when he submitted the amended complaint, Judge Lacey told him he was not in compliance with the court because the more recent examples constituted new matters ( PA31 ), even though the primary issue of fraud was untouched. Thus, in effect Judge Lacey dismissed petitioner's proposed amended complaint for complying with his order.

REBUTTAL OF RESPONDENTS' ARGUMENT IV

PETITIONER'S AGE DISCRIMINATION CLAIM UNDER THE ADEA SHOULD BE REINSTATED

In note 18 ( RB18 ) respondents repeat their erroneous statement that Oscar Mayer & Co. v. Evans, 441 U.S. 750 (1979) overrules Holiday v. Ketchum, McLeod & Grove, Inc., 584 F.2d 1221 (3d Cir. 1978), which overruled Goger v. Porter Co., Inc., 492 F.2d 13 (3d Cir. 1974) (PB26-30); i.e. petitioner does not lose his ADEA rights by filing his notice of intent to sue with N. J. Dept. of Civil Rights beyond the 180

days from cause of action.

Also petitioner should receive "equitable relief" from the effects of Goger, id., as held in the case of Roger v. Exxon Research & Engineering Co., 434 U.S. 1022 (1978). It is relevant that petitioner has been in court over six years on this ADEA claim against Western.

SUMMARY

RESPONDENTS' BRIEF IN OPPOSITION BRINGS NOTHING NEW TO THIS CASE. THEY AVOID THE REAL ISSUES, SUCH AS: TORTIOUS INTERFERENCE BY WESTERN INTO PETITIONER'S JOB OFFER FROM A. T. & T. CO. THEY FAIL TO BRING PROPER FOCUS TO THE SUCCESSFUL CASE OF PETITIONER'S CO-WORKER, KYRIAZI. KYRIAZI'S REINSTATEMENT IN THE SAME DISTRICT COURT, REFLECTS CONFLICTING RULINGS, BETWEEN JUDGE STERN AND JUDGE LACEY, IN RESPECT TO KYRIAZI'S STATE CLAIMS. RESPONDENT'S BRIEF DOES NOT ANSWER THE ARGUMENTS SET FORTH IN THE PETITION AND FAILS TO ARTICULATE THE BASIC ISSUES.

## CONCLUSION

For above reasons, it is respectfully prayed that a writ of certiorari be issued to review the judgment of the United States Court of Appeals in these cases.

This case is important for those employees, who are caught up in the mechanics of management in large monopolies and technicalities in the laws. The will of Congress is that such employees be employed and not suffer from age discrimination. Respondents have attacked petitioner's pro se status, but as stated in petition, if certiorari is granted, Professor Louis Raveson, Esq. of Rutgers University Law School's Urban Legal Clinic is willing to represent petitioner before the Supreme Court of the United States.

Respectfully submitted

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Sept., 1981

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Reply Brief for Petitioner, were mailed or delivered to Edward P. Lynch, Pitney, Hardin & Kipp, Attorneys for the respondents, at 163 Madison Ave., Morristown, N.J. 07960, on the 10th day of September, 1981

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